

AMERICAN CONCEPT OF FEDERAL UNION AND ITS WORLDWIDE INFLUENCE

United States were established as a federation. The concept of federalism as a way of organizing a system of government proved to be a very powerful one and highly attractive. It was adopted in a number of countries all over the world. Because the concept of a federal union is a genuinely American every federal constitution is to some extent modeled on the American example, although some of them in much greater degree than the others. Contemporary federal systems vary enormously and there are many reasons why the American constitution could not be simply copied in not one of modern federations. None the less, the principles of the American constitution where they concern federalism – such as division of power between separated orders of government, direct representation of the constituent parts in the national legislature or their participation in the procedure of amending the constitution – were adopted in each of them. Thus, federalism can be seen as a significant American contribution to the theory of constitutionalism, even if it failed or was rejected outright – or after short period – in some countries and had to be significantly adjusted to local circumstances in the others.

Inventing federalism

Separation from Britain resulted in the establishment of thirteen independent states in place of the former colonies, some of them having declared their independence even before the unanimous Declaration of Independence was passed by Continental Congress and announced on the 4th of July 1776. The states had thought together during the War of Independence. Nevertheless, they remained fully independent and sovereign both during the war and afterwards. Therefore, the states preceded the Union, which was in turn their creation.¹ They were formally bound together only by the Articles of

¹ There is an ongoing debate among historians whether the Union was created by the states or whether the states were the creation of the Union. For the arguments supporting the first thesis see Raoul Berger. 1987. *Federalism. The Founders' Design*. Norman and London: University of Oklahoma Press, 21–47; the opposite position is taken, for example, by J.N. Rakove. See Jack N. Rakove. 1997. *Original Meanings. Politics and Ideas in the Making of the Constitution*. New York: Vintage Books, 163–168. It seems that the arguments presented in favor of the first position, that is that the states preceded the Union and that after the War of Independence they remained fully independent entities, are based on much stronger foundations. After all, even Alexander Hamilton, who can hardly be classified as a states' rights supporter, admitted that "the State governments by their original constitutions [were] invested with complete sovereignty." *The Federalist* no. 32. In Clinton Rossiter (ed.). *Federalist Papers*. 2003. New York: Signet Classic, 192.

Confederation and Perpetual Union, which established a rather loose confederation in early 1781 when the Articles were finally ratified by all of the states. The Articles did not change the status of the states as sovereign entities. According to Article II, each one of them, being part of a confederation, retained "its sovereignty, freedom and independence."² After the war was over the Confederation was not dissolved and, at least formally, existed until 1789. However, it proved not to be an adequate solution for the problems that the newly established American republics were facing.

The concept of a federal union based on completely different principles, both from those on which earlier confederations (including the American confederation established by the Articles) were formed and those governing the operation of centralized states with one sovereign power, as it emerged from the Philadelphia convention was a compromise between two opposing conceptions presented at the convention and exemplified in the Virginia Plan, on the one hand, and in the New Jersey Plan on the other. Federalism thus "emerged as a compromise between those who were prepared to give the national government limitless superiority, entrusting the federal legislature with the power to interpret the constitution at will, and those who would keep the federal government weak in order to protect the autonomy of the several states." The opposing views were merged into a new concept of federalism "which combined a strong, presidential executive, two houses of Congress of which one represented the nation and the other the states [and] a judicial guardian of the federal constitution (...). It was a concept not limited to defense and security as the purpose and end of federal union."³

The Founders rejected the older tradition of confederacies as an inadequate solution for the American states, giving each time the same reason: lack of strong central authority. This deliberate rejection provides another argument to support the view that federalism was a genuine innovation and not just another stage in the process of developing an idea that originated in the ancient times.⁴

The emergence of strong central authority in a confederation or a league was impossible for the reason that this authority depended entirely on confederation members. Confederation could not legislate directly on the citizenry nor execute its decisions in any other way than via the member states. Even if it was possible theoretically it was definitely not in practice. Decisions made by confederal authority were binding only for the member states as collective capacities. The federal union established by the Constitution differed from such arrangements in one crucial aspect. It was to consist both of the states as separate political entities and of the individuals of whom

² *Act of Confederation of the United States of America*. In Charles L. Gammon. 2005. *The Continental Congress. America's Forgotten Government*. Baltimore: PublishAmerica, 38.

³ Carl J. Friedrich. 1960. *Origin and Development of the Concept of Federalism in the United States*. *Jahrbuch des Öffentlichen Rechts*, 9, 32.

⁴ As T. Hueglin correctly points out, "the Federalists' interpretation constituted a deliberate and radical break with that tradition. This may already be evidenced by the fact that their account of the three very same historical examples, in the nineteenth and twentieth Federalist Papers, is entirely negative. The reason given is the same in each instance: the lack of supreme central authority in these confederacies leads to 'imbecility' in governmental and social affairs." Thomas Hueglin. 2003. *Federalism at the Crossroads: Old Meanings, New Significance*. *Canadian Journal of Political Science*, 36, 276.

the states consisted. Therefore the newly established federal government would be able both to legislate directly on the population (in its proper domain) and to execute its laws independently of the states. This aspect of a constitutional plan was stressed by Alexander Hamilton in *The Federalist no. 15*, where he first called the principle of legislation for states or governments “the great and radical vice in the construction of the (...) Confederation,” and then stated that for the establishment of a national government it is essential “to incorporate” into its plan “those ingredients which may be considered as forming the characteristic difference between a league and a government.” It was necessary to have an extension of “the authority of the Union to the persons or the citizens – the only proper object of government.”⁵ The Framers were thus less concerned with broadening the objects of national government, and instead they concentrated their attention on securing that the government would be able to execute its powers independently of the states. For this reason two clauses were introduced to the Constitution, one authorizing the national government to collect taxes, and another, which later became famous “necessary and proper” clause, authorizing the national legislature to “enact all laws necessary and proper to execute its powers and those vested in the other branches of government.”⁶ The Constitution was not shifting the balance of power in the Union (although national legislature was after all vested in some powers that Continental Congress lacked, such as regulation of commerce) in as much as altering the nature of relations between the national government and the states. It was stressed by James Madison that “the new Constitution (...) consists much less in the addition of NEW POWERS TO the Union than in the invigoration of its ORIGINAL POWERS.”⁷

Federalism, unlike the doctrine of separation of powers or even republicanism, the established concepts with a strong theoretical foundation, was not “received from political theory or from historic jurisprudence.” It was a wholly new idea, invented by the Founders out of necessity. “Constructing a theory of federalism was the only way in which the Framers could have successfully sold the new governmental proposal to the states.”⁸ Federalism is an American invention, for never before had such a governmental structure existed, one that merged strong national power with the autonomic status of the constituent parts. Introducing such a concept demanded redefinition of “most of the terms in which the theory and ideology of civic humanism has been discussed.” Federalism as introduced by the Framers was thus an “entirely new concept,” its development equaled with creating “a *novus ordo seclorum*: a new order of the ages.”⁹

The concept of a federal union first and foremost challenged the traditional notion of sovereignty, brought in by J. Bodin and T. Hobbes. For both of them there could be

⁵ *The Federalist no. 15*. In Clinton Rossiter (ed.), op.cit., 103, 105.

⁶ Jack N. Rakove, op.cit., p. 179.

⁷ *The Federalist no. 45*. In Clinton Rossiter (ed.), op.cit., 289, 290.

⁸ Harry N. Scheiber. 2001. American Federalism as a Working System and as a Constitutional Model. In Jürgen Rose, Johannes Ch. Traut (eds.). *Federalism and Decentralization. Perspectives for the Transformation Process in Eastern and Central Europe*. Hamburg: LIT, 53.

⁹ Forrest McDonald. 1985. *Novus Ordo Seclorum. The Intellectual Origins of the Constitution*. Lawrence: University Press of Kansas, 262.

only one sovereign power in the polity, as sovereignty was indivisible and therefore could not be exercised by multiple subjects.

The problem of sovereignty was central not only in the age of constitution-making but also long after that. In fact, it was ultimately settled in the second half of the 19th century on the battlefields of the Civil War. This only proves that it was tremendously difficult to change the traditional view of sovereignty as an indivisible attribute of power, that could, according to this view, belong either to the Union or to the states, but by no means to both. This concept was, however, successfully challenged by the Framers. The federal union of a new kind established by the Constitution was to provide a novel idea of sovereignty, which still remained indivisible but at the same time was converted into dual or shared. For A. Hamilton it was abundantly clear that the Union and the states could not simultaneously be fully sovereign (in the traditional meaning of the term), and that the sovereign Union could not consist of completely independent states. This "political monster of an *imperium in imperio*," as he called it, constituted a "fundamental error" in the structure of Confederation.¹⁰ The federal union, as proposed in the Constitution, was not to deprive the states of their sovereignty, but instead was to make them a part of the national sovereignty: "The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their position certain exclusive and very important portions of sovereign power."¹¹ In the same spirit, J. Madison rejected the objections of the "adversaries of the proposed Constitution" who claimed that it had created not a federal but a consolidated government. For J. Madison the "proposed government" could not be "deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects."¹²

In the passages cited above we find two crucial features of a federal system of government. The first is the division of powers between general (federal) government and the federated entities. The second is the direct representation of those entities in the institutions of the federal government. Both of them were hallmarks of this new idea of a sovereign power, not concentrated at the centre but shared among multiple subjects and exercised in accordance by all of them. The idea of shared sovereignty can also be seen in the way that the Constitution could be amended. To amend the constitution both the participation of the national legislature and the states, acting as a whole entity and not through their citizens, is necessary. If the Union were the sole sovereign, then participation of the states in the amending procedure would not be required. As J. Madison noted, "the supreme and ultimate authority would reside in the *majority* of the people of the Union"¹³ as in a consolidated, national government.

The Founders were aware that the Constitution created a federal union of a new kind. The most thorough study where differences between the Union as proposed by

¹⁰ *The Federalist* no. 15, 103.

¹¹ *The Federalist* no. 9. In Clinton Rossiter (ed.), op.cit., 71.

¹² *The Federalist* no. 39. In Clinton Rossiter (ed.), op.cit., 242.

¹³ *Ibidem*.

the constitutional scheme and then-known forms of government (confederacies and consolidated governments) are discussed is provided by J. Madison, and can be found in the famous *Federalist no. 39*.¹⁴ His analysis consists of five elements that decide the true character of the government: the foundation on which it is to be established; the sources from which its powers are to be drawn; the operation of those powers; the extent of those powers; the authority by which changes in the government can be introduced.¹⁵ Detailed investigation in each of those areas led J. Madison to the conclusion that the Constitution was "neither a national nor a federal (...) but a composition of both."¹⁶ Of course J. Madison used the word "federal" as opposed to "national," thus with its older meaning when it described arrangements such as the Confederation established by the Articles. Its meaning changed later when the supporters of the Constitution called themselves Federalists. What is noteworthy, however, is that it appears to be more than clear that J. Madison was fully aware of the fact that the Constitution had created a completely new form of government unknown before, "unprecedented under the sun."¹⁷ His conclusions could not be more plain in this respect. He sums up his observations on the Constitution by pointing out that it was "in its foundation (...) federal, not national; in the sources from which the ordinary powers of the government [were] drawn, it [was] partly federal and partly national; in the operation of these powers, it [was] national not federal; in the extent of them, again, it [was] federal, not national; and, finally in the authoritative mode of introducing amendments, it [was] neither wholly federal nor wholly national."¹⁸ The Constitution was therefore for J. Madison a blend of federal and national.¹⁹ The new American system was neither a confederation composed of independent states nor a centralized, consolidated government with one supreme authority. Instead, "it was a mixture of both."²⁰

The federal system enshrined in the Constitution had five main characteristics making it an original constitutional construction. These were: division of powers between the federal government and the states; autonomy of the states as to their internal organization (limited to some extent primarily by the supremacy clause); direct representation of the states in the federal government via the Senate and their role in the process of presidential elections; constitutional amendment procedure in which both the federal legislature and the states had to be involved; procedure for resolving disputes between the national government and the states. The last point was one of the most problematic for the Founders. J. Madison was originally in favor of giving to the Congress the right to negate the state laws. This proposition was ultimately rejected,

¹⁴ For a general discussion of J. Madison's views expressed in the essay, see Francis R. Greene. 1994. Madison's View of Federalism. In *"The Federalist," Publius: The Journal of Federalism*, 24, 49–51.

¹⁵ *Ibidem*, 239.

¹⁶ *Ibidem*, 242.

¹⁷ Forrest McDonald, *op.cit.*, 276.

¹⁸ *The Federalist*, no. 39, 242–243.

¹⁹ Garrett Ward Sheldon. 2001. *The Political Philosophy of James Madison*. Baltimore: John Hopkins University Press, 67.

²⁰ Forrest McDonald, *op.cit.*, 276.

and although it is nowhere in the Constitution explicitly stated that the judicial review of the state and federal law should serve as a procedure of resolving disputes between the national government and the states, it seems that most of the Founders accepted such a solution, at least quietly.²¹ J. Madison himself confirmed in *Federalist no. 39* that, according to the Constitution, controversies “relating to the boundary between the two jurisdictions”²² would be ultimately decided by the tribunal “established under the general government” which is the federal Supreme Court.

Out of the discussions, quarrels and sometimes bitter struggles that the Framers experienced during the Convention debates, a new system of government emerged. It stood as an example to be followed by other nations. Despite the differences among contemporary federal systems and their, sometimes considerable, deviations from the original, which will be discussed later in this paper, even today all federal systems, for the reasons given above, should be seen and judged as “variations of the American model.” The adoption of it was, however, not always an easy task.

Federalism adopted, rejected and twisted

The first country that adopted federalism as a governmental model was Venezuela in 1810, thus becoming the second federation in history. It was followed by Mexico in 1824, Switzerland in 1848 and Argentina in 1853. Venezuela’s adoption of federalism was directly influenced by the US constitution, all the more because it was justified by territorial conditions similar to those that had stimulated the creation of the American federation, “in particular, the existence in the territory occupied by the former General Captancy of Venezuela of seven provinces isolated one from the other, and socially and politically configured in different ways.”²³ The reasons for establishing federal unions were similar both in Mexico and in Argentina, though in the latter, the establishment of the federal republic was preceded by a long and bloody struggle between “unitarians” and federalists. Both of these countries adopted a federal structure undoubtedly modeled on the American example.

Out of these early experiments in implementing federalism almost all of them, with the notable exception of Switzerland, turned out to be extremely unsuccessful.²⁴ The Venezuelan federation survived only a year and its collapse marked the beginning of a more than decade long war of independence. Federalism in Mexico was eliminated, after eleven years, in the constitution of 1835. Argentina remained a federal republic but in name only, given the steady centralization of power in Buenos Aires, fuelled additionally by succeeding dictatorial regimes “that became a common feature in

²¹ Jack N. Rakove, op.cit., 173–179.

²² *The Federalist no. 39*, 242.

²³ Allan R. Brewer-Carias. 2002. Venezuela. In Ann L. Griffiths (ed.). *Handbook of Federal Countries* 2002. Montreal & Kingston: McGill – Queen’s University Press, 360.

²⁴ Switzerland had its own strong tradition of pre-federal arrangements. Although in establishing federation it was under the influence of the American example (creating a bicameral legislature is a primary example), it has to be treated exceptionally.

the political history of the country [and] continued to centralize the power of the national government.”²⁵

Those early attempts proved at least that the new system invented by the Americans was not free from weaknesses (which by the time Venezuela was established as a federation showed themselves quite clearly in the United States) and that it was definitely not a panacea and did not provide a perfect solution. Simón Bolívar, one of the most ardent admirers of the federal system, which he described as “the most perfect and most suitable for guaranteeing human happiness in society,” at the same time blamed it most for the collapse of the Venezuelan republic, claiming that “what most weakened the government of Venezuela was the federalist structure it adopted.”²⁶ Federalism failed in the emerging states of Latin America because it weakened the government too much. This weakness of the national government in a federal union was in effect responsible for internal instability and consequently ungovernability of the federation. This is somehow ironic, given the fact that the intention of the American Founders was exactly to establish a strong national government.

John A. Macdonald had to remember very well these examples of unsuccessful federal experiments when the British colonies in North America planned to be united under the form of a federal union.

Uniting the colonies in any other form was virtually impossible for many reasons. It would not resolve the problem of the French community and it would not be acceptable for the maritime provinces strongly attached to their autonomy. Federalism was thus unavoidable, which, however, did not mean that it was going to be an American model of federal union. The participants of the Quebec Conference, or at least the majority of them, were highly critical of the American model, blaming it for stimulating the centrifugal forces that led, exactly at the time when Canadians started their own federalizing process, to the most serious crisis of the American federation ended ultimately by the outbreak of the Civil War. For John A. Macdonald, the main architect of the Canadian federation, the cure for these maladies was to strengthen the central government at the expense of provincial autonomy. Therefore, the national government needed be empowered with the instruments that would make possible the control of the provinces and could be utilized to restrain their possible excesses. Only a strong central power with provinces subordinated could, in his opinion, ensure the endurance of the federation in the long run. The Canadian founders were particularly preoccupied with two features of American federalism, “state sovereignty and the residual power, and they were convinced that by reversing US practice in relation to them, they could avoid the disintegrative pressures to which federal arrangements appeared vulnerable.”²⁷ In consequence, the Canadians adopted from their southern neighbor the idea of a federal

²⁵ Viviana Patroni. 2002. Argentina. In Ann L. Griffiths (ed.), *op.cit.*, 19.

²⁶ Simón Bolívar. 2003. The Cartagena Manifesto: Memorial Addressed to the Citizens of New Granada by a Citizen from Caracas. In David Bushnell (ed.), *El Libertador. Writings of Simón Bolívar*. New York: Oxford University Press, 6.

²⁷ J. Smith. 1988. Canadian Confederation and the Influence of American Federalism. *Canadian Journal of Political Science*. 21, 460–461.

union, but organized it in a different manner than their American predecessors. It was probably the first example of "creative adoption" of federalism, even more so because Canada was also the first state in history that combined federalism with a parliamentary and monarchical system of government. For this reason alone, some features of the American model could not be simply implemented.²⁸

In the end, Canadians established a highly centralized federal union, somehow ironically calling it a Confederation. Those who were opposed to the scheme, such as Jean Baptiste Eric Dorion, pointed out that the deviations from the original model were so immense that in fact it was "not a Federal union (...), but a Legislative union in disguise." J. B. E. Dorion argued that "federalism [was] completely eliminated from this scheme, which centre[d] everything in the General Government." He, clearly referring to the American model, defined federalism as "the union of certain states, which retain their full sovereignty in everything that immediately concerns them, but submitting to the General Government questions of peace, of war, of foreign relations, foreign trade, customs and postal service." However, in the Canadian scheme "all is strength and power, in the Federal Government; all is weakness, insignificance, annihilation in the Local Government."²⁹

But there was another feature of the American federal system making its adoption problematic for other nations. Although Canadians, quite surprisingly actually, did not pay much attention to it, republicanism, which became closely associated with federalism, had been decisive for the rejection of federalism in Brazil in 1834³⁰ and later would constitute a serious obstacle for the Australians who were more than eager to adopt federalism in its "pure" American version.

For the emergence of federalism it was important that the states were republics, that they established governments based on popular sovereignty and that as a result the American confederation "did not form even symbolic monarchical system."³¹ Federalism was from the beginning merged with republicanism. In fact, in the call for the reform of the Articles of Confederation and the creation of a new national government, what was at stake was a preservation of republicanism in America. In the eyes of the nationalists, a federal union of a new kind was supposed to constitute the final act of the revolution. In the words of Gordon S. Wood: "Only a new continental republic that cut through the structure of the states to the people themselves and yet was not dependent on the character of that people could save America's experiment in republicanism."³² In

²⁸ Equal representation of the provinces in the Senate was out of the question because of the French community concentrated in one province – Quebec. In the parliamentary system the upper chamber could not be embodied in similar powers as in the presidential system based on the mechanism of checks and balances. Because the Canadian constitution was an act of British parliament, the amendment procedure seemed to be unnecessary, the parliament in Westminster was the sole body empowered to change it.

²⁹ Paul B. Waite (ed.). 1969. *The Confederation Debates in the Province of Canada/1865*. Toronto/Montreal: McClelland and Stewart, 147, 148.

³⁰ See Juliusz Bardach and Hubert Izdebski. 1980. *L'Etat fédéral et le principe fédératif en histoire*. *Czasopismo Prawno-Historyczne*, XXII, 333.

³¹ Thomas Fleiner-Gerster. 1992. Federalism in Australia and in Other Nations. In Gregory Craven (ed.). *Australian Federation. Towards the Second Century*. Melbourne: Melbourne University Press, 16.

³² Gordon S. Wood. 1998. *The Creation of the American Republic 1776–1787*. Chapel Hill–London: University of North Carolina Press, 475.

Federalist no. 10, J. Madison strongly underlined those correlations between federalism and republicanism stating that an extensive republic had obvious advantages over a small one, and that the maladies incident to the republican government could be much better treated in a large than in a small republic. Size and proper structure of the Union were the best “remedies” for “diseases” of the republican government, therefore “according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting characters of federalists.”³³ This necessary concomitance of federalism and republicanism was also obvious to S. Bolívar.³⁴ According to Thomas Fleiner-Gerster, in this combination of federalism and republicanism lay “the revolutionary character of the United States Constitution.”³⁵ In light of this, the question was how could federalism ever be combined with a monarchical system, when being a federalist equaled being a republican?

This was the problem that the Australian founders faced when they were preparing unification of the colonies in the form of a federation. Although the obvious example was the Canadian federation, they soon rejected it as being too centralized. They looked fondly at the American model, but how could they adopt it when American federalism was seen as a purely republican design? It appeared that it would be possible only if the connection between the institutions of American federalism and its philosophical or ideological background could be somehow severed. In other words, the Australian founders had to look at American federalism in complete isolation from its ideological origins. It was exactly what happened in Australia and it was possible thanks to James Bryce’s *The American Commonwealth*. The Australian founders obtained knowledge about the federal system not from *The Federalist* but rather from J. Bryce’s opus. And what was characteristic for his approach to the American constitution was the refusal to acknowledge its republican background.³⁶ Instead, he argued that the institutions of American federalism were developments of the older state constitutions, which, in their turn, evolved from the British constitution. His conclusion was that in fact federalism had more to do with the British constitutional tradition than with republicanism. In this way J. Bryce “gave the Australian founders an opportunity to look at American institutions in isolation from their republican overtones.”³⁷ The adoption of the American model was not complete in Australia. It could not be, given the fact that along with federalism, a parliamentary system of government was established. Therefore, for example, the Senate had to be transformed “from a republican instrument of checks and balances, to a utilitarian device of democratic review.”³⁸

Australia provided an example of another problem in adopting federalism. To be accurate, it has to be remembered that in fact the difficulty that Australian founders

³³ *The Federalist no. 10*. In Clinton Rossiter (ed.), op.cit., 79.

³⁴ Simón Bolívar, op.cit., 6.

³⁵ Thomas Fleiner-Gerster, op.cit., 19.

³⁶ Graham Maddox. 2004. James Bryce: Englishness and Federalism in America and Australia. *Publius: The Journal of Federalism*, 34, 57.

³⁷ John S.F. Wright. 2001. Anglicizing the United States Constitution: James Bryce’s Contribution to Australian Federalism. *Publius: The Journal of Federalism*, 31, 119.

³⁸ *Ibidem*, 125.

had in accepting federalism with its ideological, republican baggage was more mental or psychological than real. After all, what they did establish was a fully democratic state with monarchical symbols only, that, from the very beginning, were of very limited significance. On the other hand, the Commonwealth of Australia provided proof that American federalism could be successfully implemented elsewhere, something which prior to the establishment of the Australian federation was not very obvious, especially considering how quickly and nastily the federal experiment ended in Latin America.

Reception of American federalism in contemporary federal systems

Federalism became influential in the twentieth century when many countries were established as a federation or were transformed from the unitary to federal system. All federal constitutions are founded on the principles of the United States constitution where it refers to federalism, which means that all five characteristics of the federal system, pointed out above, are reflected in those constitutions. However, the degree to which they adopted American solutions varies significantly. In fact, only few federations are more or less copies of the American. The reasons for this are numerous. First, federations with a parliamentary system of government could not adopt all the constitutional mechanisms from the US presidential system. Next, some of them had their own strong tradition of pre-federal arrangements reflected in their federal schemes (Germany with Bundesrat is perhaps the best example). Then, there were particular local circumstances, such as the existence of ethnic minorities that determined adoption of different solutions, for example asymmetrical arrangements as in India, Malaysia and, to a much lesser extent, Canada. Lastly, federalism fit very well into the common law system, but was problematic in the hierarchical legal system of civil law that existed in continental Europe. Therefore, "in order to establish legal system based on both federal and state law, European countries had to adapt a two-tiered system to the centralized doctrine of Continental law," which in turn led to the development of executive federalism that is a system where federal law is executed by state civil servants, instead of federal agencies.³⁹

This leads to the conclusion that even though federalism, as a way of organizing the governmental system, turned out to be highly attractive to numerous states of different historical, legal and cultural backgrounds on all the continents (especially although not exclusively) to large countries and those composed of minorities, the American federal system was not attractive to the same degree.

As T. Fleiner-Gerster points out, "perhaps history, more than theory, explains differences among federal systems."⁴⁰ The American federation was established by the unification of separate, sovereign political entities. The way a federal union is instituted determines the mode of power division between the two orders of government in the federation. When it is created by unification, the constituent parts transfer some por-

³⁹ Thomas Fleiner-Gerster, *op.cit.*, 22.

⁴⁰ *Ibidem*, 23.

tion of their sovereign powers to the national government and keep the rest of them. In effect the constitution, as in the United States, contains only a list of national powers (delegated) and leaves all the rest (residual powers) to the federated entities. Only Argentina, Australia and to some extent Mexico followed the United States' example, while other federations set up different patterns, which varies enormously. In this area the influence of American federalism appears thus to be of limited importance.

Federations that emerged from the process of decentralization tend to favor the central government, not only in the pattern of division of powers but also in limiting the autonomy of federated entities. Such limits in the United States constitution are few. Alongside the supremacy clause there is the republican form of government that federation is obliged to guarantee to the states and indirect indication that in all states there have to be both legislatures and executives. In most contemporary federal systems the limits to federated entities' autonomy are much more developed. In the extreme cases of Brazil and Republic of South Africa and to a lesser extent Austria and Argentina, federal constitutions not only establish institutions of state or provincial governments but also regulate in detail their organization, powers and mutual relations.

By establishing the Senate with equal representation of the states, the American founders invented a new justification for bicameral legislature. The function of the second chamber was representation of the interest of federated entities in the national government. Most federations have, in fact, bicameral parliaments, although there are some exceptions to the rule.⁴¹ Nevertheless, in this area the impact of the American example is probably the strongest, especially when we consider that among the federations there were some countries with no tradition of bicameralism whatsoever. Switzerland provides an example. Seven out of seventeen federal second chambers,⁴² excluding the US Senate, follow the American pattern of equal state representation, two more (Malaysia, Mexico) with some modification.⁴³ At first American senators were elected by state legislatures. Nowadays five federations use this method of electing state or provincial representatives.⁴⁴ Even before the 17th amendment was passed, the Australian founders decided that the Senate would be elected directly by the states' population. It is therefore not an entirely American idea. However, it is noteworthy that Australia and the United States, which first introduced direct elections, are now imitated by five other federations.⁴⁵ Nowhere outside the United States was the electoral college system introduced, nevertheless in some federations the constituent parts are also involved in the procedure of electing the head of state, most notably in India and Germany.

Judicial review as a procedure for resolving disputes within the federal structure was adopted almost universally, although it is present in two forms. In common law

⁴¹ In five contemporary federations there are unicameral parliaments. These are: St. Kitts and Nevis, Micronesia, Comoros, Venezuela and the United Arab Emirates.

⁴² Argentina, Australia, Brazil, Nigeria, Pakistan, Russia, Republic of South Africa.

⁴³ And it has to be also remembered that in the unicameral legislatures of Micronesia and Comoros, where distinct representation of the states and islands, respectively, is provided, they are represented by equal numbers of members.

⁴⁴ Austria, Bosnia and Herzegovina, Ethiopia, India and Pakistan.

⁴⁵ Argentina, Brazil, Nigeria, Mexico and Switzerland.

federations the Supreme Court is the final umpire in such disputes, although each ordinary court can decide on constitutional issues. On the other hand, civil law federations created specialist courts or tribunals (constitutional courts).⁴⁶ The only exceptions are Switzerland, where the disputes are resolved by referendum and Ethiopia where the second chamber of national legislature (House of the Federation) is competent to rule on such disputes. Even in Canada, where originally the right of the federal government to reserve and disallow provincial legislation was to provide appropriate procedure, the courts from the beginning, without any doubt modeled after their US counterparts, found themselves entitled to rule on constitutional issues including, naturally, also those concerning division of powers between the federation and the provinces.

The American constitution can be amended only with the consent of the Congress, expressed by special majority, and approval of the special majority of the states acting through their legislatures. This mode of constitutional amendment procedure has been quite influential. The acceptance of the constitutional amendment by the special majorities of the constituent units, which are thus directly involved in the procedure, is required in Canada (in some cases there is no need for provincial consent, in others every province has to approve constitutional amendment), Nigeria and Russia, and by simple majorities in India and Mexico. In these federations the constituent parts act through their legislatures, but in Switzerland and Australia the consent of the special majority of the cantons and states, respectively, is also mandatory. However, it can only be provided directly by the people through the referendum process. Other federations did not follow the American example, requiring only special majorities in the national legislatures for amending their constitutions, therefore excluding the direct action of the federated entities. Examples are Germany, Brazil, Austria, Malaysia (for most amendments), the Republic of South Africa, Pakistan and the United Arab Emirates.⁴⁷ In these federations the consent of the constituent part is usually given through the second chambers where they are represented.⁴⁸ None the less, all contemporary federal constitutions modeled their amendment procedures on the principle of the United States constitution, which states that the amendment cannot be accomplished by the unilateral action of one order of government, because none of them is subordinated to another.

Conclusion

Although he vigorously defended the constitutional scheme that originated in Philadelphia, James Madison, who can be fairly seen as its main architect, was all but satisfied and optimistic. He was deeply concerned that the Union, which he helped to create,

⁴⁶ See Cheryl Saunders. 1995. *Constitutional Arrangements of Federal Systems*. *Publius: The Journal of Federalism*, 25, 66–67.

⁴⁷ Ronald L. Watts. 2008. *Comparing Federal Systems*. Montreal & Kingston: McGill – Queen's University Press, 162–163.

⁴⁸ The exception is, of course, the United Arab Emirates with its unicameral legislature, which is wholly composed of members nominated by the Emirates.

would not survive if the national government became too weak. The Union not only survived but this particular constitutional structure erected by the Founders through a difficult process, has, in time, become an invention that turned out to be highly attractive to numerous nations all over the world. Federalism thus became the great contribution made by the Founders to the science of politics and government. The words "federal" and "federalism" changed their meanings forever. From now on they described the kind of political system established at the end of the eighteenth century on the eastern seaboard of North America. Therefore, it is perfectly justified to assert that "all modern federal polities, whether their people like to be reminded of it or not, are the spiritual children of the founding fathers of the Philadelphia Convention."⁴⁹

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⁴⁹ Winston G. McMin. 1994. *Nationalism and Federalism in Australia*. Melbourne: Oxford University Press, 45.

